

22, 1934

In the Privy Council.

No. 52 of 1933.



APPELLANT'S CASE.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

BETWEEN

UNITED GAS AND FUEL COMPANY OF HAMILTON LIMITED and THE CORPORATION OF THE CITY OF HAMILTON (Plaintiffs) Appellants

AND

10 DOMINION NATURAL GAS COMPANY LIMITED (Defendant) Respondent.

CASE FOR THE APPELLANTS.

1. This is an appeal from a judgment of the Court of Appeal for Ontario delivered 24th April, 1933, dismissing an appeal by the Appellants from a judgment of The Hon. Mr. Justice Wright delivered 8th July, 1932, dismissing the action. Record. p. 170. p. 150.

2. By agreement dated 24th March, 1931, the City of Hamilton granted to the Appellant Company an "exclusive franchise" for ten years to "conduct, distribute, supply and sell gas in the City" except inter alia "as to and to the extent of any existing rights and privileges that may now be held by the Dominion Natural Gas Company Limited under By-law Number 533 of the Township of Barton and the agreement entered into pursuant to the said By-law." The agreement was confirmed by the "City of Hamilton Act 1931." pp. 345-349. p. 346, l. 4.

3. The Courts of Ontario in the judgments appealed from have held that the Dominion Company has the right under By-law Number 533 to lay mains in any street now within any area that was in Barton when the By-law was passed but has since been annexed to Hamilton and the right p. 142. p. 156.

Record. to supply gas in such area even though the Company had no mains there at annexation and though the street was opened up by the City after annexation.

p. 176.  
p. 185.  
p. 177, l. 30.  
p. 178, l. 10.

**4.** Prior to its exclusive franchise the Appellant Company distributed and sold gas in Hamilton under By-law 400 passed by the City Corporation on 26th September, 1904. The obligations of the By-law were accepted by the Company by agreement dated 24th October, 1904. Under this By-law the Company was permitted to lay mains throughout the City and supply gas to the inhabitants at rates controlled by clauses 5 to 13 inclusive which prescribed maximum rates for natural gas and higher rates for any artificial gas the Company might manufacture to make up a deficiency in natural gas. The rates in force were to be reduced five cents per thousand cubic feet of gas whenever the "surplus profit fund" built up as therein described amounted to a sum equal to five cents per thousand feet consumed by customers in Hamilton in the preceding year. The privileges granted were to continue for the term of twenty years renewable for additional terms of five years unless the City at the end of a term took over the plant.

p. 184, l. 25.

**5.** The Dominion Company was incorporated on 12th October, 1904, by Letters Patent issued under the Ontario Companies Act (R.S.O. 1897, cap. 191). Its corporate purposes and objects included the production, sale and distribution of electricity and natural gas "subject to the provisions of the Act respecting Companies for supplying steam, heat, electricity or natural gas for light, heat or power" (R.S.O. 1897, cap. 200). By that Act persons desiring to form a Company for supplying steam, heat, electricity or natural gas for light, heat or power in any municipality might become incorporated under the Ontario Companies Act (R.S.O. 1897, cap. 191). Section 3 of the Act (Chapter 200) read :—

" 3. Every such company may construct, maintain, complete and operate works for the production of steam, hot air or hot water, for purposes of power and heating, or for the production, sale and distribution, of electricity or natural gas for purposes of light, heat and power, and may conduct the same by any means, through, under and along the streets, highways and public places of the City, town, or other municipality ; but as to such streets, highways and public places, only upon and subject to such agreement in respect thereof, as shall be made between the company and the municipality and under and subject to any by-law of the council of the municipality passed in pursuance thereof."

**6.** Section 4 of Chapter 200 incorporated by reference several sections, including Section 22 of R.S.O. (1897) chapter 199, an Act

respecting Joint Stock Companies, for supplying the cities, towns and villages with gas and water. That Act related to artificial gas companies. Section 22 of the Act read : Record.

10           “ 22. The Company may break up, dig and trench, so much and so many of the streets, squares, highways, lanes and public places of the municipalities for supplying which with gas or water, or both, the company has been incorporated, as are necessary for laying the mains and pipes to conduct the gas or water, or both, from the works of the company to the consumers thereof, doing no unnecessary damage in the premises, and taking care as far as may be to preserve a free and uninterrupted passage through the said streets, squares, highways, lanes and public places, while the works are in progress.”

7. By Section 566, sub-section 3, of the Municipal Act of 1897 (R.S.O. 1897, cap. 223) councils of townships, cities, towns and villages had power to pass by-laws.

20           “ 566. (3) For authorizing any gas or water company to lay down pipes or conduits for the conveyance of water or gas under streets or public squares, subject to such regulations as the council sees fit.”

In 1903 the Section was extended to apply to pneumatic transit companies for the conveyance of merchandise and other things. Having regard to its origin and history, the Section should be read as relating to companies supplying manufactured gas rather than natural gas. By-laws passed under the Section are subject to repeal under Section 8, sub-section 38, of the Interpretation Act (R.S.O. 1897, cap. 1) which expressly provides that the power to make by-laws and regulations includes the power to repeal them.

30           8. Sections 3 of Chapter 200 and 22 of Chapter 199 remained in force until 1907 when they were repealed by The Companies Act of 1907 (chapter 34, sec. 211, Schedule E). The whole Acts (Chapters 199 and 200) were repealed in 1913 by the Public Utilities Act (3-4 Geo. V. cap. 41, sec. 63). That Act (by Section 53) applied to every Company theretofore or thereafter incorporated for the purpose of supplying any public utility and Section 54 read in part as follows :

40           “ 54. (1) The Company shall not exercise any of its powers within a municipality unless and until a by-law of the council of the municipality has been passed with the assent of the municipal electors where such assent is required by the Municipal Franchises Act authorizing the Company to exercise the same. . . .”

9. The Dominion Company in 1904 controlled gas wells in Haldimand County south of Hamilton, a large manufacturing City offering a good p. 195, l. 15.

- Record. market for the sale of natural gas. The Company, in order to supply its gas in this market, found it necessary to pipe it through Barton Township which consisted of farm lands with some residential sections near the City.
- p. 186. **10.** By-law Number 533 was passed by the Township of Barton on  
p. 192. 26th October, 1904, and it was accepted by the Dominion Company by agreement dated 19th November, 1904. It authorized the Dominion Company to carry its mains through the Township to the city limits. The Company was required to lay mains on highways mentioned in clause 1 by 1st November, 1905. When that was done, but not before, the Company might lay mains in any or all other highways in the Township. By  
p. 192, l. 13. clause 22 an additional line was to be laid at the same time as those referred to in clause 1. The Company was not, however, bound to lay any mains other than those referred to in clauses 1 and 22. Persons along the line of any main were entitled to be supplied with gas. 10
- p. 304, l. 39. **11.** The Respondent admittedly did not build the line referred to in clause 22 but it sought to prove that it built those described in clause 1. That fact, however, was not established. A contractor and a former  
pp. 98, 107. superintendent of the Company gave evidence as to the building of some but not all of the lines.
- p. 189, l. 30. **12.** By-law 533 of Barton controlled the rates to be charged by the  
Dominion Company. Clauses 10 to 18 inclusive adapted to the Township the provisions that applied in Hamilton under clauses 5 to 13 of By-law 400. In addition, clause 9 stipulated that gas must be supplied in Barton at the same rates and on the same terms as the Company supplied gas in Hamilton. By clause 13 the reduction in rates based on the "surplus profit fund" was to take place when the amount in the fund equalled five cents per thousand feet of gas consumed by customers in both the City and the Township. The By-law did not expressly fix a term for the franchise but it could only operate in favour of the Township as to the rates to be charged so long as the Company's gas was being sold in Hamilton under a franchise effective  
there. Municipal councils could contract for a supply of gas for a period not exceeding ten years (R.S.O. 1897, cap. 223, sec. 568). 20
- p. 195. **13.** The Respondent Company arranged for the distribution and sale of its gas in Hamilton through the Appellant Company under By-law 400. By an agreement between the two Companies dated 25th September, 1905, the Dominion Company agreed to construct at its own expense the transmission line from the gas field and to furnish gas to the Appellant at a point in Hamilton. It agreed to use diligence to furnish sufficient quantities for all customers the Appellant might secure within the City limits "as the said limits now exist or may hereafter be established by law." The  
Appellant Company agreed to construct at its own expense a complete distribution system of mains and service pipes in the streets of Hamilton sufficient in size and capacity to fully supply natural gas to all inhabitants 40

of the City who might desire to use it. The gross receipts from this joint venture were to be divided 60 per cent. to the Dominion Company and 40 per cent. to the Appellant Company. The agreement ran for nineteen years from 25th September, 1905, expiring at the end of the twenty-year period fixed by Hamilton By-law 400.

Record.

**14.** In 1904 when By-laws 400 and 533 were passed the legislation respecting the annexation of part of a township to a city was to be found in the Consolidated Municipal Act 1903 (3 Ed. VII, cap. 19). Section 24 provided for annexation and Section 56 contained the only express reference  
10 to the effect of annexation on by-laws. It read :—

“ 56. In case an addition is made to the limits of any municipality, the by-laws of the municipality shall extend to the additional limits, and the by-laws of the municipality from which the same has been detached shall cease to apply to the addition, except only by-laws relating to roads and streets, and these shall remain in force until repealed by by-laws of the municipality to which the addition has been made.”

In 1913 (3-4 Geo. V. cap. 43) the Section was amended to read :—

**33.** Where a district or a municipality is annexed to a  
20 municipality, its by-laws shall extend to such district or annexed municipality, and the by-laws in force therein shall cease to apply to it, except those relating to highways, which shall remain in force until repealed by the council of the municipality to which the district or municipality is annexed, and except by-laws conferring rights, privileges, franchises, immunities or exemptions which could not have been lawfully repealed by the council which passed them.”

**15.** Exhibit 37 is a map showing the portions of Barton annexed to Hamilton after By-laws 400 and 533 were passed and shows many streets opened after they were brought into the City. Annexations took place on  
30 3rd September, 1908 ; 1st November, 1909 ; 21st January, 1910 ; 18th January, 1912 ; 1st January, 1914 (2) ; 1st April, 1920 ; 1st January, 1923 ; 1st April, 1924 ; 6th May, 1925 ; 1st October, 1928 (2) ; and 28th February, 1929. The area annexed in 1909 was the largest and the most important single area.

Book of  
Plans.  
p. 42, l. 4.  
p. 204, l. 3.  
p. 211, l. 3.  
p. 225, l. 18.  
p. 228, l. 31.  
p. 229, l. 25.  
p. 236, l. 25.  
p. 244, l. 7.  
p. 281, l. 34.  
p. 289, l. 32.  
p. 302, l. 8.  
p. 317, l. 28.  
p. 322, l. 9.  
p. 328, l. 12.

**16.** The Appellant Company, in the exercise of its privileges under By-law 400 and pursuant to its agreement with the Dominion Company, carried its mains into annexed areas when they came within the City. The Dominion Company continued to supply gas to its customers on streets where its mains were laid at the date of annexation.

p. 57, l. 2.

**17.** Under the Barton By-law 533 the Company was required to  
40 obtain the permit of the Township Council before opening any highway for the purpose of laying mains and By-law 30 of Hamilton required a permit

p. 188, l. 20.

Record.  
p. 112, l. 26.  
p. 82, l. 1.  
p. 87, l. 1.  
pp. 330-342.

from the City Engineer before any pavement was opened for any purpose. The Dominion Company did not apply to the Township Council of Barton for permits and none were issued. It applied for permits under By-law 30 of Hamilton and they were issued, except for some months in 1929, when the question was raised whether in the circumstances they ought to be issued. The Dominion Company thereupon threatened to carry on the work without permits and it was thought desirable to issue the permits so that a proper record would be kept in the City offices as to work actually done.

p. 90, l. 19.

**18.** Under the Municipal By-laws and Agreements Act passed in 1909 (9 Ed. VII. cap. 75), municipalities were prohibited from granting to any company or persons the right to use or occupy streets or construct any public utility in the municipality or supply gas to the Corporation except under By-law submitted to and approved by the electors. The Act was repealed and the Municipal Franchises Act (2 Geo. V. cap. 42) was substituted in 1912. This Act enlarged and extended the prohibitions contained in the earlier Act. The Act of 1912 was amended in subsequent years but at all times after 1909 there was a statutory prohibition against granting franchises without the assent of electors.

**19.** The supply of natural gas from the Ontario gas fields was diminished by 1919 to such an extent that the Legislature by an Act passed in that year (9 Geo. V. cap. 13) and a subsequent Act of 1921 (11 Geo. V. cap. 17) authorized the Minister of Lands, Forests and Mines or a Commissioner acting under him to regulate the use of gas and to control its production, transmission, distribution and consumption. The shortage of gas in the case of the Dominion Company became so pronounced that on 11th December, 1920, it threatened that it would in the Spring of 1921 remove its mains from the Township, except those mains that were laid under clause 1 of By-law 533.

p. 251.

**20.** In view of this shortage, the Appellant and Respondent Gas Company entered into temporary agreements with the City of Hamilton in the months of April, May, June, August and October, 1921, whereby they agreed to adopt measures to increase the supply of gas and in return were permitted until 1st December, 1921, to charge rates that were higher than those set out in By-law 400.

pp. 253-270.

**21.** On 29th November, 1921, By-law 2590 was passed by the City of Hamilton with the assent of electors. It recited that the continually decreasing supply of natural gas made it necessary to establish a plant to manufacture gas and that to attract capital for that purpose reasonable rates must be established. It amended By-law 400 by prescribing new rates for natural gas and for artificial gas and in consideration thereof the Appellant Company agreed to erect a modern gas holder of 5,000,000 cubic feet capacity ; to establish a plant to manufacture artificial gas sufficient to

p. 271.

supply the existing and future requirements of the City ; and to provide a uniform gas service up to a specified standard. The Company by contract, dated 15th December, 1921, accepted the obligations of the By-law. Record.  
p. 278.

**22.** The Dominion Company's contract of 1904 to supply natural gas for Hamilton terminated 25th September, 1924, but temporary arrangements were made whereby it furnished gas to the Appellant Company until 26th March, 1925, after which date the Appellant Company supplied its customers largely with artificial gas manufactured at the plant erected pursuant to By-law 2590. pp. 292, 294,  
296, 298.  
p. 61, l. 12.

10 **23.** In the years 1926 and 1927 the Dominion Company commenced to lay mains in some of the streets in annexed areas forming part of the City of Hamilton and to take customers from the Appellant Company. Though of no substantial consequence in the early stages this venture culminated in a most active campaign in 1928, 1929 and 1930 when the Dominion Company laid mains in many Hamilton streets where the Appellant Company's mains were already serving the inhabitants, removed meters and services, substituting meters and services of the Dominion Company and thereby took over some 6,000 customers. Some of the streets had been brought into Hamilton by annexation and others had been opened in the  
20 annexed areas after annexation. p. 57, l. 6.  
p. 125, l. 10.

**24.** In this state of confusion and wasteful expenditure the Appellant Company and the City of Hamilton entered into the agreement of 24th March, 1931, above referred to, whereby an exclusive franchise (subject to the existing rights of the Respondent under By-law 533) was granted to the Appellant Company for ten years at rates considerably lower than those specified in By-law 400. The agreement was authorized by By-law and was confirmed by an Act of the Legislature and this action was commenced to determine the question whether the Dominion Company has any, and if so what, rights under By-law 533. p. 345.  
p. 344.

30 **25.** The legislation bearing on the questions involved in the appeal will be found set out in an Appendix.

**26.** The Hon. Mr. Justice Wright who tried the action held that By-law 533 was not repealed with reference to the annexed areas by annexation but continued in force therein after they became part of the City. He found on the evidence that the mains had not been laid on all the highways specified in clause 1 of By-law 533 but thought that this condition if ever a condition precedent had become a condition subsequent by the conduct of the parties. In his view the Township could not limit the Respondent to particular highways and that its rights  
40 extended to all highways whenever or wherever established in districts detached from the Township and annexed to the City after the passing of By-law 533. The learned Judge did not think it necessary to decide the Respondent's point that the Appellant is estopped by reason of

Record. acquiescence but it struck him as anomalous that a franchise could be acquired by estoppel. His conclusion was that the Respondent had the right to construct and maintain its pipe lines on any highways in the territory which was within the Township on 19th November, 1904, when By-law 533 was passed, whether the highways were established before or after annexation ; and to supply and sell gas therefrom in Hamilton.

p. 156.

**27.** The Appellants appealed to the Court of Appeal for Ontario. The Chief Justice who delivered the judgment of the Court was of opinion that "the Township of Barton" mentioned in By-law 533 meant the area embraced within what were the actual boundaries of the Township when the By-law was passed and that By-law 533 is still in force in the annexed areas. He thought the intention of By-law 533 was to grant a perpetual franchise and that it was in the nature of an irrevocable license. It would be unreasonable to hold, in his opinion, that the supply of gas was to be limited either as to locality of highways or as to time and he agreed with the trial judge that the Respondent Company's rights extended over all highways whenever established. He thought there was substantial though not full compliance with the conditions of the By-law. In his opinion the City is estopped by its conduct from questioning the rights claimed by the Respondent. The appeal was dismissed with costs. 19 20

**28.** The Appellants submit that the judgments pronounced in the Ontario Courts should be set aside ; that it should be declared that the Respondent has no rights to conduct, distribute, supply or sell gas in annexed areas after annexation, and has no right to lay mains in any streets or highways in the annexed areas in Hamilton, or alternatively, in those that were not in existence when By-law 533 was passed or were not in existence at the date of annexation ; that an injunction should be granted appropriate to the declaration made ; that mains laid without authority should be removed ; and that the Respondent should pay to the Appellant Company the damages it has sustained since the date of its exclusive franchise by the wrongful acts of the Respondent. 30

**29.** The Appellants submit that the appeal should be allowed and the above relief granted for the following amongst other

### REASONS.

- (1) BECAUSE the exception in favour of the Respondent under the agreement and Statute of 1931 must be strictly confined to existing rights and privileges held under By-law 533.
- (2) BECAUSE the By-law on its true construction is and was intended to be effective only within the corporate limits of the Township as existing from time to time. 40



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- (3) BECAUSE the By-law was not effective as to highways after they ceased to be township highways or to highways that were established in the township after the By-law was passed, or to highways that were established in Hamilton after annexation.
- (4) BECAUSE the conditions of the By-law were not complied with.
- (5) BECAUSE the By-law did not confer any rights in perpetuity and could at all times have been repealed by the Township.
- (6) BECAUSE the By-law ceased to be effective at the end of ten years, the limit of time for which the Township might contract for a supply of gas.
- (7) BECAUSE the By-law ceased to be effective when the Respondent's gas was not sold generally throughout Hamilton.
- 20
- (8) BECAUSE the By-law conferred no right or privilege on the Respondent to conduct, distribute, supply or sell gas, but was passed solely to bring into effect the provisions of R.S.O. 1897, cap. 200, which was repealed in part in 1907 and wholly in 1913.
- (9) BECAUSE the Respondent cannot exercise any of its powers within Hamilton without a by-law of the council of that municipality.
- (10) BECAUSE Section 566 (3) of the Municipal Act 1897 authorizes by-laws relating only to laying pipes under streets and not to by-laws for the distribution or sale of gas and a by-law passed under it applies only within the municipality passing it.
- 30
- (11) BECAUSE there is no estoppel as against either Appellant and in any case rights thus acquired are not protected by the agreement and Statute of 1931.
- (12) BECAUSE the two Gas Companies by their agreement of 25th September, 1905, adopted the corporate limits of the Township and the City as existing from time to time as the boundary for the purposes of By-laws 400 and 533 and the Respondent is estopped from laying mains and supplying and selling gas in Hamilton.

W. N. TILLEY.

J. A. McNEVIN.

O. M. WALSH.

**In the Privy Council.**

No. 52 of 1933

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*On Appeal from the Court of Appeal for  
Ontario.*

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BETWEEN

UNITED GAS AND FUEL COMPANY  
OF HAMILTON LIMITED and THE  
CORPORATION OF THE CITY OF  
HAMILTON (*Plaintiffs*) - *Appellants*

AND

DOMINION NATURAL GAS COMPANY  
LIMITED (*Defendant*) - *Respondent.*

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CASE FOR THE APPELLANTS.

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